



**State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES**

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-5171



Robert C. Brown
136 Edgewater Drive
Gilford, NH 03246

RE: Shore Road, Gilford

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
NO. AF 01-001**

January 2, 2001

I. Introduction

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division (the "Division") to Robert C. Brown, pursuant to RSA 482-A:13 and Env-C 601.05. The Division is proposing that fines totaling \$6,500 be imposed against Robert C. Brown for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II Parties

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. Robert C. Brown is an individual having a mailing address of 136 Edgewater Drive, Gilford, NH 03246.

III. Summary of Facts and Law Supporting Claim(s)

1. RSA 482-A:13 authorizes the Commissioner of the Department of Environmental Services ("DES") to impose administrative fines of up to \$2,000 per offense for violations of RSA 482-A.
2. Pursuant to RSA 482-A:13, the Commissioner has adopted Env-C 614 to establish a schedule of fines for violations of RSA 482-A, rules adopted under RSA 482-A, and permits issued under RSA 482-A.
3. RSA 482-A:14, III provides that failure, neglect or refusal to comply with RSA 482-A or rules adopted under that chapter, or an order or condition of a permit issued under RSA 482-A, and the misrepresentation by any person of a material fact made in connection with any activities regulated or prohibited by RSA 482-A shall be deemed violations of RSA 482-A.
4. On July 19, 2000 and August 2, 2000, DES personnel inspected property located at 103 Shore Road Extension, more specifically referenced on Town of Gilford tax maps as Tax Map 221, Lot 48 (the "Property"). Town of Gilford records confirm that Mr. Brown is the owner of the Property and has been the owner at all relevant times. The purpose of the inspections was to determine compliance with RSA 482-A and NH Code of Admin. Rules Wt 100-700.
5. The inspections revealed the following:
 - a) A barge tied to the shore of the Property was observed during both inspections.
 - b) The barge had registration number NH1782AU displayed on its side. According to records on file with the New Hampshire Department of Safety, the barge is registered to Robert C. Brown.

- c) During both site inspections, boat bumpers were observed tied to the side of the barge. During the inspection on July 19, 2000, a motor boat with registration MS7425AT was observed tied to the barge. During the inspection on August 2, 2000, a canoe was observed tied to the barge. The battery that would be used for the operation of the barge was not observed during either inspection.
- d) The barge was held in place with at least three spuds driven into the bed of Lake Winnepesaukee and bolted to the barge.
- e) The barge was pushed tight against the shore of the Property, and was accessible via a metal ramp placed between the shore and barge.
- f) The barge appeared to be in the same location during both inspections.

6. During the summer of 2000, DES personnel performed regular inspections on Lake Winnepesaukee as part of a summer lake inspection program. During the course of performing other inspections on Lake Winnepesaukee, the barge was observed to be in the same approximate position each time DES inspectors observed the Property. Boats were observed tied to the barge on many of those occasions.

7. On those occasions that DES personnel observed the barge, it appeared to be in use for purposes consistent with a dock, including the following: (a) the barge was observed to be in the same location throughout the 4 months of inspections on Lake Winnepesaukee; (b) the barge's battery was not observed during the July 19 and August 2 inspections, making the barge inoperable; (c) the barge was tied to shore and could be accessed from shore; (d) boat bumpers were observed tied to the side of the barge; (e) boats were tied to the barge; and (f) people were observed using the barge while it was tied to the shore.

No permit for the dock/barge is on file with DES.

9. Mr. Brown is knowledgeable and experienced in matters pertaining to wetlands regulations, including docks. In addition to a significant number of dock and other shoreline projects for which Mr. Brown or his companies have acted as agent and/or contractor, specific evidence of his prior knowledge and experience with wetlands rules and regulations includes the following:

- a. File No. 90-2351 (Hopgood property): On May 21, 1992, the NH Wetlands Board (the predecessor of DES for purposes of wetlands regulation) issued an Administrative Fine Order (No. WB-92-24) against Campbell Marine Construction, Inc. ("CMC") that resulted in a \$2,000 suspended fine. The Wetlands Board made the following relevant findings as part of its Order:
 - 1) Robert Brown is the president and owner of CMC.
 - 2) Robert Brown of CMC has intimate knowledge and awareness of the Wetlands Board laws and rules and of the Board permitting procedure.
 - 3) Robert Brown has been a marine contractor on Lake Winnepesaukee for over 10 years.
 - 4) CMC violated RSA 482-A:3, I by depositing excavated fill material into Lake Winnepesaukee adjacent to the property....CMC violated conditions #1, 6, 7 and 8 of permit 90-2351 by failing to: a) place dredged spoils out of jurisdiction; b) conduct work during drawdown; c) install siltation/erosion controls prior to, during construction or until area is stabilized; carry out all boathouse construction shoreward of elevation 504.32.
 - 5) CMC through Robert Brown has actual awareness of the Wetlands Board statute and rules and the Board's permitting procedures.

On January 14, 1994, the Wetlands Board issued a Fine Consideration Notice to CMC to impose the \$2,000 suspended fine for failure to comply with the May 21, 1992 Order. By agreement, the fine was reduced to \$1,000, and CMC made final payment of the fine on November 17, 1994.

- b. File No. 92-1652 (Dock Rules Working Group): In 1992, Mr. Brown was a member of a Dock Working Group, formed to review and make recommendations to DES for amendments to the then-existing dock rules. On August 7, 1992, the Dock Working Group submitted to the Wetlands Board a proposal for amendments to the dock rules. The Dock Working Group was described as "an informal committee which has had the goal of developing a set of shoreline structure rules which will both protect the public's interests in waters of the state and allow increased flexibility in structure design and construction. We [the Dock Working Group] have attempted to develop an internally consistent set of rules that can be fairly applied across the state." The Dock Working Group's proposal was signed by Mr. Brown.
- c. File Nos. 94-261 and 95-1079 (Misty Harbor Resort): On September 11, 1996, the Wetlands Board received a complaint that Misty Harbor Resort had moored a construction barge off its beach, and installed a "gang plank from shore to barge to create a docking facility." Although Mr. Brown was not involved as a responsible party with this complaint, Misty Harbor Resort initially hired Mr. Brown as contractor and agent to remove the seasonal pier and install a permanent piling supported pier. During the course of the investigation against Misty Harbor Resort, Division personnel had several conversations with Mr. Brown about the improper use of a barge as a dock. These conversations with Mr. Brown occurred in the fall of 1997 or winter of 1997-98. Mr. Brown was aware that using a barge as a docking structure was illegal.
- d. File No. 97-1789 (Israel property) and File No. 97-1611 (Bourgeois property): On January 22, 1999, the Division issued a Notice of Proposed Administrative Fine and Hearing (No. 99-12) to Mr. Brown seeking fines totaling \$4,300 in his individual capacity as contractor for work performed on the shore of Lake Winnepesaukee. The Division alleged that Mr. Brown: (a) failed to install appropriate siltation, erosion and turbidity controls during construction; (b) failed to post the permit on site during construction; and (c) constructed 12' stairs instead of two 4' wide stairs allowed under the permit. On January 27, 1999, the Division issued a Notice of Proposed Administrative Fine and Hearing (No. 99-11) to Mr. Brown seeking fines totaling \$6,300 in his individual capacity as contractor for work performed on the shore of Lake Winnepesaukee. The Division alleged that Mr. Brown: (a) made land in public waters without a permit; (b) excavated approximately 24 sq. ft. of bank without a permit; (c) failed to install appropriate siltation/erosion or turbidity controls prior to construction or while work was taking place; and (d) disturbed existing rocks located at normal high water.

On April 7, 2000, the parties executed a settlement agreement to resolve both Administrative Fine Nos. 99-11 and 99-12. Under the terms of the settlement, Mr. Brown agreed to pay administrative fines totaling \$3,800. An additional \$4,500 fine was suspended by agreement on the condition that the suspended fine was "contingent on Mr. Brown paying the amount due . . . and complying with all applicable statutes and rules of DES for a period of two years from the date of execution of this Agreement by Mr. Brown." DES received payment of the \$3,800 fine on April 7, 2000.

10. On August 18, 2000, DES received an Expedited Seasonal Dock Notification signed by Mr. Brown for construction of a 6'x40' seasonal dock on the same shorefront on which the barge was observed. On August 29, 2000, DES requested written verification that the barge observed on the shoreline frontage would not be used for securing of any watercraft or for any other land based activities. DES has no record of receiving a response to the August 29, 2000 letter.

11. RSA 482-A:3, I states that "[n]o person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES]."

12. Lake Winnepesaukee is a water of the state as described in RSA 482-A:4, II.
13. Wt 101.78 defines "structure" to include "something installed, erected or constructed. Structure(s) include, but are not limited to, the following: fence, dock, breakwater, post, pile, building, bridge, culvert and wall."
14. Wt 101.24 defines a "dock" to include "a structure intended for securing of watercraft and/or to discharge and load passengers, freight, and other goods whether the structure is in the water or not."
15. Env-C 614.02(d) defines a Class I violation as including "[u]nauthorized construction or modification of a seasonal pier, wharf, or other similar docking structure listed under Wt 402, with 2 or less slips, including pre-existing slips."
16. Env-C 614.06(b) defines an extraordinary violation as including "[c]ommitting repeated violations on the same or different property or project."

IV. Violations Alleged

1. Robert C. Brown has violated RSA 482-A:3 and RSA 482-A:14, III by installing a barge at the shore of the Property and using it as a seasonal dock without a permit from DES. Because of Mr. Brown's knowledge of applicable requirements and history of non-compliance, the Division deems this to be an extraordinary violation.
2. Robert C. Brown has violated the settlement agreement on Administrative Fine Nos. 99-11 and 99-12 by failing to comply with all applicable statutes and rules of DES for a period of two years from the date of execution of the agreement by Mr. Brown.

V. Proposed Administrative Fines

1. For the violation identified in IV.1 above, the Division is seeking a fine of \$2,000 pursuant to Env-C 614.06(b).
2. For the violation identified in IV.2 above, the Settlement Agreement for Administrative Fine Nos. 99-11 and 99-12 specifies imposition of the suspended fine of \$4,500.

The total fine being sought is \$6,500.

VI. Hearing, Required Response

You have the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, February 5, 2001 at 9:00 a.m. in Room C-110** of the DES offices at **6 Hazen Drive** in Concord, N.H.

Pursuant to Env-C 601.06, you are required to respond to this notice. Please respond no later than **January 18, 2001**, using the enclosed form as follows:

1. If you plan to attend the hearing, please sign the appearance (upper portion) and return it to James Ballentine, DES Enforcement Paralegal, as noted on the form.
2. If you choose to waive the hearing and pay the proposed fine, please sign the waiver (lower portion) and return it **with payment of the fine** to Mr. Ballentine.

3. If you wish to discuss the possibility of settling the case, please sign the appearance and return it to Mr. Ballentine and call Mr. Ballentine to indicate your interest in settling.

You are not required to be represented by an attorney. If you choose to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

If you wish to have a hearing but are unable to attend as scheduled, you must notify Mr. Ballentine at least one week in advance of the hearing and request that the hearing be rescheduled. If you do not notify Mr. Ballentine in advance and do not attend the hearing, the hearing will be conducted in your absence in accordance with Env-C 204.09.

VII. Determination of Liability for Administrative Fines

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that you committed the violation(s) alleged and that the total amount of fine(s) sought is the appropriate amount under the applicable statute and rules. Proving something by "a preponderance of the evidence" means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that you committed the violation(s) and that the total amount of fine(s) sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that you prove, by a preponderance of the evidence, applies in this case:**

1. The violation was a one-time or non-continuing violation, **and** you did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** you did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, you were making a good faith effort to comply with the requirement that was violated.
3. You have no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to your case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

The hearing that has been scheduled is a formal hearing. The hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that you committed the violation(s) alleged above and that the fine(s) should be imposed. The hearing is your opportunity to present testimony and evidence that you did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced. If you have any evidence, such as photographs, business records or other documents, that you believe show that you did not commit the violation(s) or that

otherwise support your position, you should bring the evidence to the hearing. You may also bring witnesses (other people) to the hearing to testify on your behalf.

If you wish to have an informal meeting to discuss the issues, you must contact Mr. Ballentine at (603) 271-6072 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via DES's Web page (www.des.state.nh.us). If you have any questions about this matter, please contact James Ballentine, DES Enforcement Paralegal, at (603) 271-6072.


for Harry T. Stewart, P.E.
Director, Water Division

Enclosures: (NHDES Fact sheet #CO-2)

cc: Gretchen Rule, DES Enforcement Coordinator
Susan Alexant, DES Rules & Hearings Attorney
Gilford Conservation Commission
Gilford Board of Selectmen
Marjory Swope, NHACC
Michael Walls, DOJ/EPB
Richard W. Head, DES Wetlands Bureau (File #00-1695)